UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ELAN DORSEY, Appellant, v. DEPARTMENT OF THE AIR FORCE, Agency.	)	DOCKET NUMBER SF-0752-96-0350-I-4 DATE: JUN 2, 1998

Alan J. Reinach, Esquire, Westlake Village, California, for the appellant.

Lt. Colonel Charles P. Kielkopf, Esquire, Arlington, Virginia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

The appellant timely petitions for review of an April 22, 1997 initial decision that affirmed the agency's removal action. For the following reasons, we DENY the appellant's petition for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115, REOPEN the appeal on our own motion pursuant to 5 C.F.R. § 1201.118, and AFFIRM the initial decision's findings regarding the charges and the appellant's discrimination claims AS MODIFIED by this Opinion

and Order. We VACATE the initial decision's findings regarding the appellant's claim of retaliation for filing equal employment opportunity (EEO) complaints, and REMAND this appeal for further adjudication of that issue consistent with this Opinion and Order.[1]

BACKGROUND

The agency removed the appellant from his GS-12 General Engineer position based on charges of deliberate misrepresentation, failure to request leave according to established procedures, refusal to comply with a proper order, falsification of an official document, and unauthorized absence from work resulting in a charge of absence without leave (AWOL). *See Dorsey v. Department of the Air Force*, MSPB Docket No. SF-0752-96-0350-I-1 (AF-1), Tab 4, Subtabs 4b and 4c.

On appeal, the appellant asserted that the charges were based on religious discrimination. AF-1, Tab 1. The appellant claimed that, as a Seventh-day Adventist whose religious beliefs precluded him from working on his Sabbath (sundown Friday to sundown Saturday), the agency did not provide him with a reasonable accommodation so that he could avoid working on his Sabbath. *See id*. The appellant also alleged that the removal action constituted retaliation for filing EEO complaints. *See Dorsey v. Department of the Air Force*, MSPB Docket No. SF-0752-96-0350-I-3 (AF-3), Tab 4.

After a hearing, the administrative judge (AJ) sustained the charges and found that the appellant did not prove religious discrimination or retaliation for filing EEO complaints. The AJ found that the appellant was assured time off

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[1] The appellant's request to present oral argument is DENIED. The appellant has no right to oral argument on petition for review, *see* 5 C.F.R. § 1201.117(a)(2) (the Board "may" hear oral arguments), and he has failed to show a sufficient basis for granting such a request in this appeal, *see, e.g., Satterfield v. Department of the Navy*, 58 M.S.P.R. 152, 155 n.4 (1993).

every other weekend and allowed to trade shifts with co-workers to accommodate his Sabbath; the appellant's supervisor occasionally worked weekends so the appellant would not have to work on his Sabbath; and the appellant refused to reciprocate when other crew members asked the appellant to swap work on non-Sabbath days. The AJ also found that the agency's action promoted the efficiency of the service, and that the penalty of removal was reasonable.

The appellant has petitioned for review, and the agency has filed a timely response to the petition for review.[2]

ANALYSIS

Reasonable Accommodation

On review, the appellant alleges that the agency discriminated against him when it failed to reasonably accommodate his religious beliefs that preclude him from working on his Sabbath. The appellant also asserts that the AJ should have considered whether undue hardship to the agency would have resulted from four possible accommodations that were not adopted by the agency. For the reasons set forth below, however, we need not address the appellant's arguments.

Although not a basis for the AJ's determination, the Board may apply the doctrine of collateral estoppel, or issue preclusion, if: (1) The issue previously adjudicated is identical to that now presented; (2) that issue was actually litigated in the prior case; (3) the previous determination of that issue was necessary to the resulting judgment; and (4) the party precluded by the doctrine was fully represented in the prior case. *See Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 341 (1995). Collateral estoppel can be invoked to preclude the relitigation of

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[2] Although the appellant filed a reply to the agency's response after the record closed on review, he did not show or even allege that these additional arguments are based on evidence that was not readily available before the record closed on review. *See* 5 C.F.R. § 1201.114(i). We have not, therefore, considered the appellant's reply to the agency's response.

a mixed issue of fact and law such as that at issue here. *See Montalvo v. U.S. Postal Service*, 50 M.S.P.R. 48, 50 (1991).

The appellant initiated an appeal to the Equal Employment Opportunity Commission (EEOC) from a final agency decision concerning a complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. *See Elan Dorsey v. Department of the Air Force*, EEOC Appeal No. 01951063 (Apr. 11, 1997); Hearing Transcript (HT) (Feb. 10, 1997) at 97-98 (the appellant testified that he raised the issue of religious accommodation in an EEO complaint that, at the time of the February 1997 Board hearing, was "at the Commission level."). The appeal included an assertion of discrimination based on religion (Seventh-day Adventist), namely, an alleged denial of the reasonable accommodation of not working on his Sabbath. The EEOC's April 11, 1997 decision noted that, since September 1993, the agency permitted the appellant to swap schedules with other employees, and this method enabled the appellant to observe his Sabbath for some time. However, several of the appellant's co-workers ceased agreeing to swap shifts with him because the appellant refused to reciprocate when they sought to swap shifts. The EEOC concluded that, given the agency's efforts to schedule around the appellant's religious holy days when sufficient personnel were available, and its allowance of voluntary shift swaps, the agency met its burden of reasonably accommodating the appellant's religious needs.

Collateral estoppel appears to apply here. *See Fuentes v. U.S. Postal Service*, 54 M.S.P.R. 4, 9 (1992) (an EEOC appeal does not have to involve the same cause of action at issue in a Board appeal for collateral estoppel to apply); *cf. Newberry v. U.S. Postal Service*, 49 M.S.P.R. 348, 352-53 (1991) (applying collateral estoppel to an arbitration decision). The issue adjudicated by the EEOC, whether the agency reasonably accommodated the appellant's religious beliefs, is identical to the issue here. Moreover, the issue was actually litigated

before the EEOC, the EEOC's determination was necessary to its judgment, and the appellant was "fully represented" in his EEOC appeal. *See Fisher v. Department of Defense*, 64 M.S.P.R. 509, 515 (1994) (whether an appellant was "fully represented" in a prior case looks to whether the party had a full and fair chance to litigate the issue, not whether the party was represented by an attorney).

Even assuming, however, that collateral estoppel does not apply,[3] we would still find that the appellant has not met his burden of proving religious discrimination based on a failure to reasonably accommodate him because he has not established a prima facie case of such discrimination. To make out a prima facie case, the appellant had to show that: (1) He had a bona fide religious belief that conflicted with an employment requirement; (2) he informed the agency of the belief; and (3) he was disciplined for failure to comply with the conflicting requirement. *Reed v. Department of Transportation*, 76 M.S.P.R. 126, 131 (1997). There is no dispute that he met the first two of these requirements. Nevertheless, the circumstances surrounding the appellant's misconduct suggest that he was not disciplined "for failure to comply with the conflicting requirement," i.e., based on his failure to report to work when his bona fide religious beliefs required that he not work.

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[3] It could be argued that collateral estoppel does not apply, even though its prerequisites appear to have been met, because the appellant lacked the incentive to litigate the issue before the EEOC, his stake in that proceeding being minimal in comparison with his stake in this proceeding. *See Wildberger v. Small Business Administration*, 69 M.S.P.R. 667, 670 (1996). While the appellant's job was not *directly* at stake in the EEOC proceeding as it is here, his failure to prevail before the EEOC perpetuated, from the appellant's point of view, a conflict between his bona fide religious beliefs and his work, thereby forcing him to continue to make difficult decisions that placed his job in jeopardy. We therefore believe that the appellant's stake in the EEOC proceeding, although different, was not minimal in comparison with his stake in this proceeding.

The agency essentially charged the appellant with: (1) Misrepresenting to his crew leader that he had obtained permission from their supervisor to leave work early on a non-Sabbath shift that he had swapped because of his Sabbath obligations; (2) calling in one and one-half hours after his shift on a Sabbath had started, informing the crew leader that he would not be coming to work, and failing to report for work or request leave at that time, resulting in a charge of AWOL; (3) reporting for duty two hours and fifteen minutes after the start of his scheduled 4:15 p.m. shift on a Sabbath, but certifying on a time sheet that he had reported for duty at 4:15 p.m.; and (4) failing to provide administratively acceptable medical documentation to support a request for sick leave during an absence on his Sabbath. *See* AF-1, Tab 4, Subtabs 4e and 4g. The AJ sustained these charges, and the appellant does not contest them on review.

The appellant contends, however, that "but for" the agency's alleged failure to reasonably accommodate his religious beliefs, he would not have committed such misconduct. Nevertheless, he does not argue that his religious beliefs required him to make deliberate misrepresentations, fail to request leave according to established procedures, falsify an official document, or refuse to comply with a proper order to submit acceptable medical documentation regarding an absence. *See* HT (Feb. 10, 1997) at 131 (the appellant testified that his refusal to provide further medical documentation had nothing to do with the Sabbath, but was at the advice of counsel), and 161-62 (the appellant testified that the "misunderstanding" regarding his leaving work early on a non-Sabbath shift had nothing to do with the Sabbath). The appellant's religious beliefs merely prevented him from working on his Sabbath. Under these circumstances, we find that the appellant has not met the third element of a prima facie case of religious discrimination. *See Robinson v. U.S. Postal Service*, EEOC Appeal No. 01934794 (Sept. 1, 1994) (no prima facie case where the employee's failure to call in to report her absence was not caused by her attendance at a religious meeting that

triggered the absence); *Cosby v. Department of the Army*, EEOC Request No. 05910153 (Mar. 27, 1991) (no prima facie case where the employee was removed for tardiness, and there was no indication that her tardiness was related to her religious beliefs); *Shabazz v. Department of the Navy*, EEOC Petition No. 03900130 (Jan. 7, 1991) (no prima facie case where the agency removed the employee for failure to follow leave-requesting procedures, and the employee did not identify any religious practice that conflicted with the procedures the agency established for obtaining leave).[4]

Even assuming that collateral estoppel does not apply and that the appellant established a prima facie case of discrimination, we would give deferential, if not preclusive, effect to the findings of the EEOC on the same religious discrimination issue raised by the appellant in this appeal. *See Bannister v. General Services Administration*, 42 M.S.P.R. 362, 367 (1989) (decisions of the Comptroller General, although not entitled to collateral estoppel effect, may be given deference by the Board where: (1) The issue to be resolved is identical to the one in the prior action; (2) the issue was litigated in the prior action; (3) the determination in the prior action was necessary to the resulting judgment; and (4) the party against whom the doctrine is applied was fully represented below).

We also note that the EEOC is the agency charged with interpreting Title VII, and that the Board generally lacks the authority to disagree with a decision of the EEOC which rests upon an interpretation of discrimination law, and which is

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[4] We are mindful of the Supreme Court's statement in *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67-68 (1986), a case involving religious accommodation claims, that whether a plaintiff had established a prima facie case of discrimination is not relevant once a case is fully tried on the merits. Nevertheless, because 5 U.S.C. § 7701(c)(2)(B) provides that an agency's decision may not be sustained if the employee shows that the decision was "based on" a prohibited personnel practice such as religious discrimination, we address the prima facie case to the extent that it includes a "causation" requirement.

not so unreasonable that it amounts to a violation of civil service law. *See Hurst v. Department of the Navy*, 61 M.S.P.R. 277, 282 (1994); *see also Martin v. Department of the Air Force*, 73 M.S.P.R. 590, 594 (1997) (the Board must defer to the EEOC regarding issues of substantive discrimination law); *Kimble v. Department of the Navy*, 70 M.S.P.R. 617, 622 (1996) (giving deference to an EEOC decision in an appeal not based on a nonconcurring EEOC decision). Here, the EEOC's interpretation of discrimination law in deciding the religious accommodation issue does not appear to be so unreasonable that it amounts to a violation of civil service law. We therefore defer to it.

The agency established a neutral rotating shift system under which it initially scheduled employees for an equal number of day, swing, grave, weekend, and Holiday shifts. *See* AF-1, Tab 4, Subtab 4gg, 4ll; HT (Feb. 10, 1997) at 200 (the appellant testified that he was scheduled to work every other weekend). The authorization of voluntary swaps within such a neutral rotating shift system has been found to constitute a reasonable religious accommodation under Title VII. *See Beadle v. Hillsborough Co. Sheriff's Dept.*, 29 F.3d 589, 593 (11th Cir. 1994); *see also Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145-46 (5th Cir. 1982); *Moore v. A.E. Staley Mfg. Co.*, 727 F.Supp. 1156, 1161 (N.D. Ill. 1989). As the AJ found, the agency also accommodated the appellant by arranging swaps for him, having his supervisor work some weekends for the appellant when the supervisor was not required to, and allowing the appellant to work his Sabbath shift on "standby" at home, as the third "scheduler" to be on call only if needed. HT (Nov. 13, 1996) at 92-94. This latter accommodation, however, was unsuccessful because the agency was unable to reach the appellant by telephone when the agency called him at home to report for duty because of a co-worker's unexpected illness. HT (Feb. 10, 1997) at 173-74; HT (Nov. 13, 1996) at 17-18.

The EEOC's decision also appears to be based on the principle that employees have a duty under Title VII to cooperate with the measures suggested

by their employers, making good faith attempts to satisfy their religious needs through the means offered by employers. *See Brener*, 671 F.2d at 145-46. It appears that the EEOC did not view the appellant's refusal to reciprocate by swapping shifts with co-workers on non-Sabbath days, *see* AF-3, Tab 4, Exhibit E at 88; HT (Nov. 13, 1996) at 94; HT (Nov. 14, 1996) at 15; HT (Nov. 14, 1996) at 191, as a good faith attempt to satisfy his religious needs through the reasonable accommodation offered by the agency.

Accordingly, we find that the appellant has not proven religious discrimination based on a failure by the agency to reasonably accommodate him.

Disparate Treatment

The appellant also attempts to prove his claim of religious discrimination based on a "disparate treatment" theory. Under this theory, an employee must demonstrate through the use of direct or circumstantial evidence that the employer treated him differently than other employees because of his religious beliefs; the evidentiary burdens placed on the employee mirror those placed on employees alleging discrimination based on race or sex. *Reed*, 76 M.S.P.R. at 130-31.

The appellant alleges that there is direct evidence of religious discrimination in the form of a statement made by his first-line supervisor. Effective July 12, 1995, the appellant received a "fully successful" performance appraisal for the period July 1, 1994, to June 30, 1995. *See* AF-3, Tab 4, Exhibit T, Subtab 9 at 5-6. The appellant testified that, when he asked his supervisor about a "bad" performance appraisal in late 1995, his supervisor told him that "the reason why I'm giving you low performance appraisals is because ... you don't want to work on your Sabbath." HT (Feb. 10, 1997) at 28. The appellant testified that the supervisor "said something about that you're one of our ... best schedulers ..., and it has ... nothing to do with your performance. It's that you just won't work on the Sabbath. That's why I'm giving these ... low marks." *Id*.

Even assuming that this testimony by the appellant is credible, it is not direct evidence of discrimination because it does not bear directly on the specific employment decision in question, namely the appellant's removal. *See, e.g., Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569-70 (7th Cir. 1989); *see also George v. U.S. Postal Service*, 74 M.S.P.R. 71, 80 (1997) (direct evidence of discrimination may be any written or verbal policy or statement made by an employer that both reflects directly the alleged discriminatory attitude and bears directly on the contested employment decision).

The appellant may establish a prima facie case of discrimination based on circumstantial evidence by showing that he engaged in prohibited conduct similar to that of a person outside his protected class, and that disciplinary measures enforced against him were more severe than those enforced against the other person. *Reed*, 76 M.S.P.R. at 134. The burden of proof would then shift to the agency to articulate some legitimate, nondiscriminatory reason for its actions; if the agency meets that burden, the appellant bears the ultimate burden of showing that the reasons offered by the agency were not the true reasons for its actions, but merely pretext for discrimination. *Id*.

The appellant has not identified any agency employee who was not a Seventh-day Adventist and who engaged in similar misconduct but was not removed. In fact, the agency's deciding official testified that there was "no precedent" on the Air Force base for the type of misconduct committed by the appellant. HT (Nov. 14, 1996) at 65. In any event, the agency established a legitimate, nondiscriminatory reason for the appellant's removal, and the appellant has not shown that this reason was merely a pretext for prohibited discrimination.[5]

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[5] The appellant correctly points out that the AJ erred when she stated that a prima facie case of discrimination based on disparate treatment includes a showing that a difference in treatment was based on an intent to discriminate. As we held in *Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476,

Retaliation for filing EEO complaints

The appellant claims on review that the AJ erred when she required him to show intent to discriminate as part of a prima facie case of retaliation for filing EEO complaints, and failed to consider evidence allegedly demonstrating retaliation.

The AJ found that in order to prove retaliation for filing EEO complaints the appellant had to show that: (1) He was a member of a protected class; (2) he was similarly situated to an individual who was not a member of his protected class; (3) he was treated in a disparate manner compared to other individuals who were not members of his protected class; and (4) the difference in treatment was based on an intent to discriminate. Initial Decision at 12. The AJ acknowledged that the appellant had filed four EEO complaints and that the deciding official was aware of the complaints, but found that the appellant did not show that he was treated in a disparate manner or that any difference in treatment was based upon an intent to discriminate. *Id.* The AJ further found that, inasmuch as the charges had been sustained, the appellant produced no evidence that the proffered reason for his removal was pretext for prohibited discrimination. *Id*. at 13.

We find that the AJ applied the wrong elements of proof to the appellant's retaliation claim. In order to establish a claim of retaliation for engaging in EEO activity, the appellant had to show that: (1) He engaged in EEO activity; (2) the accused official knew of such activity; (3) the adverse action under review could,

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497 (1997), "a showing of discriminatory intent is not required to establish a prima facie case of discrimination." Nevertheless, this error has not prejudiced the appellant's substantive rights. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision). The appellant has not shown that he engaged in prohibited conduct similar to that of a person outside his protected class, and that disciplinary measures enforced against him were more severe than those enforced against the other person, nor has he shown that the action was pretext for discrimination.

under the circumstances, have been retaliation; and (4) after careful balancing of the intensity of the motive to retaliate against the gravity of the misconduct, a nexus is established between the motive and the subsequent action. *E.g.*, *Jones v. Department of the Navy*, 75 M.S.P.R. 115, 122 (1997). The requirements set forth by the AJ relate to establishing a prima facie case of prohibited discrimination based on disparate treatment, not retaliation for engaging in EEO activity. *See Kline v. Tennessee Valley Authority*, 46 M.S.P.R. 193, 201 (1990), *aff'd in part*, 805 F. Supp. 545 (E.D. Tenn. 1992).

Here, the appellant engaged in EEO activity, *see* AF-3, Tab 4, Exhibit G, and the deciding official was aware of such activity, *see* HT (Nov. 14, 1996) at 112-14.[6] The removal could have been retaliation because some of the EEO complaints accused the deciding and proposing officials of discrimination. *See* AF-3, Tab 4, Exhibit G; HT (Nov. 14, 1996) at 113; HT (Nov. 13, 1996) at 120; *Richard v. Department of Defense*, 66 M.S.P.R. 146, 155 (1995).

Having applied the wrong elements of proof for the appellant's retaliation claim, however, the AJ did not determine whether there was a genuine nexus between the alleged motive to retaliate and the removal action. Because such a finding requires the weighing of conflicting testimony and the assessment of witness credibility, which is more properly the province of the AJ, a remand is necessary for further fact findings and credibility determinations on this issue. *See Adair v. U.S. Postal Service*, 66 M.S.P.R. 159, 166 (1995).

ORDER

Accordingly, we remand this appeal to the Western Regional Office for further fact findings as to whether the appellant proved that there was a genuine nexus between any motive to retaliate and the removal action. In making this

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[6] The proposing official testified that he knew he was the subject of one or more EEO complaints filed by the appellant. HT (Nov. 13, 1996) at 120-21.

determination, the AJ shall take into consideration the evidence the appellant alleges in his petition for review demonstrates retaliation.

If the appellant establishes that his filing of EEO complaints was a substantial or motivating factor in his removal, the AJ shall determine whether the agency has met its burden of proving by preponderant evidence that it would have taken the same action even if the protected conduct had not taken place. *See Madison v. Department of the Air Force*, 32 M.S.P.R. 465, 477 (1987); *Gerlach v. Federal Trade Commission*, 9 M.S.P.R. 268, 273-76 (1981).

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.